ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

RESPONSE REQUESTED

No. 02-112

Supreme Court, U.S.
FILED
OCT 15 2002
CLERK

UNITED STATES OF AMERICA,

Petitioner,

- vs -

VICENTE PINEDA-TORRES,

Respondent.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Pursuant to Title 18 United States Code §3006A(d)(6) and Rule 39 of this Court, Respondent, Vicente Pineda-Torres, asks leave to file the attached Brief in Opposition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed *in forma pauperis*.

Petitioner was represented by counsel appointed pursuant to Title 18 United States Code §3006A in the district court and on appeal to the Ninth Circuit Court of Appeals.

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Respectfully submitted,

Dated: October 15, 2002

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether expert testimony concerning the structure and modus operandi of drug trafficking organizations is properly excluded under Fed. R. Evid. 401 and 403 in a prosecution of an alleged drug courier for importation of narcotics when there is no evidence connecting the defendant to a drug trafficking organization and there is no evidence that a drug trafficking organization was involved in the offense.

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-112

UNITED STATES OF AMERICA,

Petitioner,

- v -

VICENTE PINEDA-TORRES,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO
UNITED STATES' PETITION FOR WRIT OF *CERTIORARI*

Respondent Vicente Pineda-Torres respectfully requests that the Court deny the Solicitor General's petition for a writ of *certiorari* filed on behalf of the United States.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *United States v. Pineda-Torres*, 287 F.3d 860 (9th Cir. 2002).

JURISDICTION

On April 23, 2002, the Ninth Circuit entered its judgment. 287 F.3d 860. The government has invoked the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

21 U.S.C. §§ 841(a), 952(a), and 960(a) are set forth at *Petitioner's Appendix* ("*Pet. App.*") at 28a-30a.

Fed. R. Evid. 401, 403 and 702 are set forth at *Pet. App.* at 30a-32a.

STATEMENT OF THE CASE

A. Facts

On August 2, 2000, Mr. Vicente Pineda-Torres, the respondent, came to the San Ysidro Port of Entry driving a 1991 Mercury Cougar. He had been in Mexico visiting a friend in Tijuana. He was arrested after 19.40 kilograms of marijuana were discovered concealed in the dashboard area of the car.

At the port of entry, an Immigration and Naturalization Service ("INS") Inspector Carlito Cruz asked Mr. Pineda certain inspection questions. Mr. Pineda indicated that he was a permanent resident, he presented his INS documents, and he stated that the car belonged to a friend. The Inspector then asked to see the registration which provided that the registered owner was an individual named Bob Armando Rodriguez.

After receiving the registration, Inspector Cruz asked Mr. Pineda who owned the car, and for the registered owner's address. Mr. Pineda said that Bob Armando Rodriguez owned the car and lived at the address listed on the registration. Mr. Pineda said that he lived near Los Angeles, but that he had been visiting a friend in Tijuana. After a canine alerted to the car, Mr. Pineda was escorted to secondary inspection.

At trial, the INS Inspector testified that, in his opinion, Mr. Pineda appeared "nervous," did not make eye contact, "look[ed] down," and had a "scratch" in his voice. However, cross-examination revealed that the Inspector had noted in his report that a "Mr. Beltran" not Mr. Pineda-Torres, was nervous on August 2, 2000, the day of the arrest in this case. The inspector denied using a form or a "boilerplate" report to produce this one. Instead, he claimed that the insertion of a completely different name was just a "typo." Inspector Cruz admitted that his report, written on

August 2, 2000, did not contain any information indicating that Mr. Pineda-Torres was "avoiding eye contact," or that there was any scratch in his voice when he spoke.

A detailed inspection of the car revealed marijuana hidden in a secret compartment in the dashboard area in an amount of 42.7 pounds. One could not see the marijuana if the glove box was opened; it was neither visible through the vents in the car, nor could it be detected by a human's sense of smell.

B. The Expert Testimony

1. The Pretrial Expert Notice

Prior to trial, the government informed defense counsel that it would introduce testimony regarding the structure of drug smuggling organizations. By way of letter, the prosecutor noted that the expert witness "will testify that: (1) the drivers of load vehicles typically do not own the drugs they are transporting; (2) the driver of a load vehicle is typically not the person responsible for loading the drugs into the car, and accordingly, fingerprinting is generally not a useful tool in the investigation of border busts; and (3) the driver of a load vehicle is typically not entrusted with transporting the vehicle to a load house, but usually only to a neutral site." *Respondent's Appendix* ("*Resp. App.*") at 1a.

2. The *In Limine* Hearing

Mr. Pineda-Torres moved to preclude admission of "drug structure and organization testimony" pursuant to Federal Rules of Evidence 702, 401 and 403. *Pet. App.* at 13a-14a. Without stating why this testimony was relevant, the government claimed that the evidence of "compartmentalization within the drug smuggling organization" was admissible under "the *Cordoba*[1]

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[1] *United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997)

case." *Pet. App.* at 14a. The district court stated that it would rely upon the "government's trial brief,"[2] to find that "the evidence they seek to elicit would be appropriate." *Pet. App.* at 14a. The district court instructed defense counsel to "make your plan accordingly." *Pet. App.* at 14a. Defense counsel argued that under the specific facts of Mr. Pineda-Torres' case, the expert testimony should not be admitted, *Pet. App.* at 15a (defense counsel pointed out, "the *Cordoba* case deals with a large conspiracy case and [Mr. Pineda-Torres'] was a small marijuana case . . . [involving] 19.4 kilograms of marijuana"), but the trial judge simply ruled that this expert testimony was admissible. *Pet. App.* at 14a-15a.

3. Mr. Pineda-Torres "planned accordingly."

In accordance with the trial judge's directive, defense counsel cross-examined a government witness regarding whether or not any fingerprint evidence was taken in this case. The government witness did not know whether fingerprinting had occurred. *Pet. App.* at 17a. The entire exchange consumed less than one page of the trial transcript. *See id.*

4. The expert testimony offered at trial

At trial, the government introduced the testimony of Senior Special Agent Robert Villars of the United States Customs Service. He was final witness for the prosecution and he was tendered to the jury as an expert on "narcotics smuggling" and the value of marijuana. *Pet. App.* at 18a. The prosecutor began the examination by discussing the fingerprint issue and having Senior Special Agent Villars indicate that fingerprinting the marijuana's packaging materials would be a fruitless endeavor:

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[2] The government conceded that it had not briefed the issue of the admissibility of this evidence. *Pet. App.* at 14a. It filed a trial memorandum which simply recited that it would introduce expert testimony "regarding the structure of drug smuggling organizations." *Resp. App.* at 3a-4a.

Q: Agent Villars, in your investigations of reactive cases such as this one, have you found fingerprinting the drug packaging to be a valuable tool in your investigations?

A: No sir.

Q: Why not?

A: Several reasons. First of all, the material that is used to package the drugs is not conducive to pull prints off of. It also depends on how it is hidden. If it is within the gas tank, the gas would be -- being -- a solvent -- would take the oil from the fingerprints. It would destroy that. Also the fingerprints -- if you were indeed to find a set of recognizable prints, you would most likely not be able to identify the fingerprints because it's from somebody south of the border of which we have no records in the United States.

Pet. App. at 18a-19a.

The prosecutor then elicited a description of the structure of generic drug trafficking organizations:

Q: Based on your experience and investigations, is the driver of the vehicle generally the person responsible for loading the narcotics into the vehicle.

A: No sir.

Q: Why not?

A: It is very come [sic] compartmentalized. It is sectioned off for several reasons, one being security. They don't want to give away where they are. Also it is very specialized in that everybody has a specific duty within the organization.

Q: Are these sophisticated enterprises?

A: Yes sir, they are.

Q: You were talking about compartmentalization and different functions. Could you describe to the jury what those functions are?

A: Basically what it takes to get the produce coming North from the person who plants the seed in the ground, grows it and harvests it to pack it into the big 18-wheelers other boats or airplanes that bring it up to the border.

* * * *

> Then you have the people who warehouse it at the border, who store it, again the people who break it down into smaller packages, people who shape the packages for the vehicle, the type of conveyance they are using, people who procure the vehicles, who hire the drivers, who rent the houses on this side of the border, the stash houses, to secure their produce one (sic) they get here. Everybody has a specific task.

Q: What's the purpose of the drug smuggling organization?

A: Like any other corporation, to make money.

Pet. App. at 18a-20a; *Resp. App.* at 9a.[3] No witness ever testified that any particular drug trafficking organization was involved in this case.[4]

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[3] Respondent included a page from the Reporter's Transcript where Agent Villars discusses the "purpose of the drug smuggling organization" which was omitted from the Solicitor General's Appendix.

[4] Although no reasons for admission of this testimony were proffered to the district court, on appeal, the prosecution stated that this testimony was offered to show: "[t]hat the driver is not just going off on a lark, but is delivering the vehicle loaded with drugs at a time and place specified and that the driver does not necessarily have large amounts of money.

* * * *

> [T]he limited expert testimony was relevant here, in order to clarify for the jury, the Government theory of the case: That Pineda did not have a proprietary interest in the marijuana, but was simply acting as a courier. . .. Simply put, this testimony explained that Pineda was not the wealthy proprietor of the marijuana, but was just a paid courier, who was delivering the marijuana for someone else to someone else.

Government's Response Brief on appeal at 5a-6a. The government also noted that here, the testimony was "specifically relevant" to "the timing of the smuggling venture, i.e., the fact that someone is waiting for the marijuana," and "to show that the driver is not a rich drug lord with a proprietary interest in the drugs but, just an everyday person being used to bring the drugs across." *Resp. App.* at 5a.. Finally, the prosecution contended that the expert "merely explained that Pineda's role as a knowing courier was a very limited one." *Resp. App.* at 6a (emphasis added).

At the trial level, there was never any testimony about whether or not the driver had a

Subsequent to Inspector Villars, the smuggling expert, no other evidence was presented at the trial, and the sole issue discussed in closing argument was whether or not Mr. Pineda-Torres knew about the marijuana hidden in the secret compartment of Mr. Bob Rodriguez's car. During summation, the prosecutor argued to the jury that "a sophisticated drug organization" was at work. *Resp. App.* at 7a-8a. The following day, the jury found Mr. Pineda-Torres guilty of both counts of the indictment. On January 29, 2001, he was sentenced to a term of 37 months incarceration, three years supervised release and a special assessment of $200.00. He appealed the convictions.

C. The Ninth Circuit's Opinion

The Ninth Circuit Court of Appeals reversed Mr. Pineda-Torres' convictions. *See Pineda-Torres*, 287 F.3d 860. It held that admission of Special Agent Villars' testimony, under the facts of Mr. Pineda-Torres' case, constituted "prejudicial error." *Id.* at 861. The decision focused upon the facts of Mr. Pineda-Torres' case, including the government's pre-trial expert notice which indicated that the prosecution would introduce not only the typical evidence regarding the structure of drug trafficking organizations but that they would affirmatively raise and address the lack of fingerprint evidence through the proposed smuggling expert. *Id.* at 862. The decision discussed the trial judge's *in limine* hearing where the testimony, including the fingerprint testimony, was deemed admissible, and where Mr. Pineda-Torres was told to "make [his] plan accordingly." *Id.* (brackets in original).

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proprietary interest in the marijuana, about the driver's lack of riches or the "timing of the smuggling venture." *See Pet. App.* at 18a-25a. Although in front of the court of appeals, the government conceded that its purpose was to "explain Pineda's role as a knowing courier," in this Court, the Solicitor General disavows such a motive, complimenting the district court in *United States v. McGowan*, 274 F.3d 1251 (9th Cir. 2001), petition for cert. pending No. 02-64 (filed July 12, 2002) ("*McGowan Pet.*") for being "meticulous in limiting Special Agent Villars's testimony about the compartmentalization of drug smuggling functions to avoid specific statements that the driver knew about the drugs." *See McGowan Pet.* at 14 n.5.

Mr. Pineda-Torres' cross-examination of the government witness regarding fingerprints was "[i]n response to this directive." *Id.*

The decision also discussed in detail Agent Villars' trial testimony and the prosecutor's contention, in closing argument, that Mr. Pineda-Torres, as part of a "sophisticated drug organization, [] must have known that drugs were in the car." *Id.* at 863.

The appeals court indicated that the facts of Mr. Pineda-Torres' case, involving a single defendant, driving a car from Mexico into the United States, with marijuana concealed in a hidden compartment within the car, where the prosecution introduced no evidence of any "connection between the defendant and a drug trafficking organization" were "similar" to the facts in *United States v. Vallejo*, 237 F.3d 1008, 1012 (9th Cir. 2001), *amended*, 246 F.3d 1150 (9th Cir. 2001).[5] *Pineda-Torres*, 287 F.3d at 863-864.

Also, similar to *Vallejo* was that the prosecution in *Pineda-Torres* never articulated pre-trial why this expert testimony was relevant. *Pineda-Torres*, 287 F.3d at 863. The appeals court rejected the basis offered on appeal: that this evidence showed that Mr. Pineda-Torres knew that drugs were in the car, because "had that been the [government's] purpose, the district court should properly have excluded it under Rule 403 of the Federal Rules of Evidence." *Id.* at 864 (citing *Vallejo*, 237 F.3d at 1016). The *Pineda-Torres* court discussed *Vallejo*, noting that there, the admission of expert testimony about the structure of drug trafficking organizations in a "simple border bust case" absent evidence associating the defendant with a drug trafficking organization, impermissibly allowed the unsupported inference that the defendant was "a member of an enormous international drug

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[5] The court of appeals also noted that the charges: importation and possession of marijuana with intent to distribute it, 21 U.S.C. §§§ 952, 960 & 841, were the same as those in the *Vallejo* case. *Id.* at 863-864.

trafficking organization and implied that he knew of the drugs in his car because of his role in that organization . . . ." *Id.* at 864-65 (citing *Vallejo*, 237 F.3d at 1017. It was the absence of any facts associating the defendant with any drug trafficking organization which led both the *Vallejo* and the *Pineda-Torres* courts to conclude that admission of expert testimony about the structure of drug trafficking organizations was similar to the "improper use of drug courier profiles." *Id.* at 864 (citing *Vallejo*, 237 F.3d at 1017). Citing *Vallejo*'s finding, that under its facts, which were virtually identical to Mr. Pineda-Torres', the smuggling expert's testimony "unfairly imputed specific knowledge to Vallejo [where] knowledge was the central question before the jury," the *Pineda-Torres* court ruled that admission of the evidence was prejudicial error, necessitating reversal. *Id.*

The *Pineda-Torres* court did not articulate a "bright-line" or "categorical" rule regarding admission of this type of expert testimony. In fact, after its extensive discussion of the facts of Mr. Pineda-Torres' case, it pointed out that other related types of expert testimony were not precluded in the Ninth Circuit and may have been admissible given the proper factual predicate. *See, e.g., id.* at 863 (discussing *United States v. Murillo*, 255 F.3d 1169 (9th Cir. 2001) (permitting "'unknowing drug courier'" and modus operandi testimony that "drug traffickers do not routinely entrust large quantities of drugs to people who are unaware that they are transporting them"); *United States v. Campos*, 217 F.3d 707, 712 (9th Cir. 2000) (upholding unknowing courier testimony in a "complex drug importation case"); *United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997) (same) and *United States v. Alatorre*, 222 F.3d 1098, 1100 n.3 (9th Cir. 2000) (allowing drug trafficking organization and structure testimony where defendant opens the door by arguing lack of fingerprints)). While recognizing that when the proper foundation exists, this type of "structure" evidence could be admissible, the *Pineda-Torres* decision held that absent such foundation, *i.e.*, evidence associating the defendant with an actual drug trafficking organization, allowing "'an expert

to extrapolate about the various roles individuals might play in hypothetical drug trafficking organizations,'" was overly prejudicial. *Id.* at 865 (quoting *Murillo*, 255 F.3d at 117).

The *Pineda-Torres* court specifically discussed both the *Murillo* and *Alatorre* cases, finding that unlike *Murillo* and *Alatorre*, Mr. Pineda-Torres had not "opened the door" to this type of testimony because "it was not [he] who first introduced the fingerprint evidence issue. Rather, the government notified the defense that it intended to have Special Agent Villars testify that fingerprinting would not be helpful in drug importation cases because of the compartmentalized structure of trafficking organizations," *Pineda-Torres*, 287 F.3d. at 865-66, and the district court told Mr. Pineda-Torres to "plan accordingly." *Id.* at 866.

REASONS FOR DENYING THE PETITION

The Solicitor General believes that the question pending before this Court in *United States v. McGowan*, 274 F.3d 1251 (9th Cir. 2001), petition for cert. pending No. 02-64 (filed July 12, 2002) ("*McGowan Pet*") at 5, is identical to the question presented in this case, thus, it urges the Court to hold this writ of certiorari pending the disposition of the *McGowan certiorari* petition, No. 02-64. *Pet.* at 5. The Solicitor General believes that Mr. Pineda-Torres' case "presents the question whether expert testimony concerning the structure and modus operandi of drug trafficking organizations is categorically prohibited by the Federal Rules of Evidence in the prosecution of a drug courier for importation of narcotics." *Pet.* at 4. The Solicitor General believes that "the Ninth Circuit cases reveal that it has created a *per se* bar to this form of expert testimony in a significant category of cases." *McGowan Pet.* at 7.

First, the court of appeals' decision in *Pineda-Torres* is not appropriate for a grant of *certiorari* because it does not present a conflict with any other court of appeals' decision regarding an important issue. Second, the *Pineda-Torres* decision in no way presents the question of whether

a certain type of expert testimony is "categorically prohibited" nor does it exemplify any sort of *per se* bar to admission of expert testimony regarding the structure of drug trafficking organizations in certain broad categories of cases. As is demonstrated below, the *Pineda-Torres* decision is heavily dependent upon its particular facts and nowhere articulates any type of *per* se rule or categorical prohibition. Thus, even if the Solicitor General is correct that *McGowan* sets forth a *per se* rule, it is clear that the fact-intensive approach applied in the instant case does not. Finally, the Ninth Circuit has not created a *per se* rule precluding certain expert testimony in *Pineda-Torres* or any other case. The respondent also believes that neither the *McGowan* nor the *Vallejo* decisions of the Ninth Circuit exemplify any categorical prohibition or *per se* rule excluding a particular type of expert testimony in some broad category of cases and that discussion has been fully set forth in the Brief for Respondent, Daniel McGowan, in Opposition To The United States' Petition For Writ of *Certiorari* To The United States Court of Appeals For The Ninth Circuit, No. 02-64, filed on September 9, 2002 ("*McGowan Opposition*") at pp. 11-34. Mr. Pineda-Torres incorporates by reference all arguments made in that response.

A. The Decision In Pineda-Torres Does Not Present A Conflict With Other Appeals Court Decisions Nor Does It Present A Question Of Such Significance That This Court Should Grant The Solicitor General's Petition

According to this Court's Rules, a petition for writ of *certiorari* should only be granted for "compelling reasons." Sup. Ct. R.10. Such compelling reasons include a conflict with another court of appeals' decision or where the appeals court has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." *Id.* Neither reason exists here.

The decisions in *Vallejo*, *McGowan* or *Pineda-Torres* do not conflict with the decisions of any other circuit. No other circuit to date has even cited these authorities. In fact, the Second Circuit has reached a similar result in a case involving testimony about organized crime in which the defendants were unconnected to the organization. *See United States v. Long*, 917 F.2d 691, 701-03 (2d Cir. 1990).

The Solicitor General's argument that *Vallejo* creates some conflict between the circuits essentially boils down to the position that any case which approves some sort of expert testimony on *modus operandi* or any other issue related to drug trafficking, conflicts with *Vallejo*, *McGowan* and *Pineda-Torres*. *See McGowan Pet.* at 16-19. The authorities he cites, *id.*, do not support his position. It is not the case that any decision which approves some sort of expert testimony about *modus operandi* related to drug trafficking, conflicts with the decisions in *Vallejo*, *McGowan* and the instant case. None of the cases where courts permit this *modus operandi* type testimony present fact patterns analogous to respondent's case. *See id.* Moreover, the premise -- that *Vallejo*, *McGowan* and respondent's case create a *per se* rule that is inconsistent with drug *modus operandi* cases -- is flawed: the Ninth Circuit itself has confirmed that such evidence remains admissible post-*Vallejo* and that *Vallejo* established no such *per se* rule. *See, e.g., United States v. Valencia-Amezcua*, 278 F.3d 901, 909 (9th Cir. 2002) ("*Vallejo* expressly approved admissibility of *modus operandi* testimony").

In addition, this *modus operandi* evidence is not always admitted as substantive evidence of guilt when it runs afoul of cases precluding drug courier profile testimony. *See United States v. Beltran-Rios*, 878 F.2d 1208,1210 (9th Cir. 1989) (criticizing the use of expert testimony of drug profiles as substantive evidence). In *United States v. Brito*, 136 F.3d 397 (5th Cir. 1998), the government offered evidence of "a profile of family drug organizations," and then compared the

defendants -- several family members -- to the profile. The Fifth Circuit flatly rejected such testimony: "[t]his type of profile evidence is inadmissible to prove substantive guilt based on similarities between defendants and a profile." *Id.* at 412 (citing *United States v. Williams*, 957 F.2d 1238 (5th Cir. 1992)).

Other Circuits employ similar reasoning. *See, e.g., United States v. Small*, 74 F.3d 1276, 1283 (D.C. Cir. 1996) ("drug-courier profile evidence was relevant only to the officers' probable cause and not to Small's guilt") (citations omitted); *United States v. Jones*, 913 F.2d 174, 177 (4th Cir. 1990) ("the trial court abused its discretion [by] admit[ting] expert testimony of drug profiles as substantive evidence"); *United States v. Quigley*, 890 F.2d 1019 (8th Cir. 1989) (same); *accord* Mark J. Kadish, *The Drug Courier Profile: In Planes, Trains, And Automobiles; and Now in the Jury Box*, 46 Am. U. L. Rev. 747 (1997) (severely criticizing the use of "drug courier profile" testimony). The various *modus operandi* cases thus lead to two conclusions. First, they are factually distinct from *Vallejo*, *McGowan* and *Pineda-Torres*; none of them involve even remotely similar fact patterns. Second, while it appears that there may be some tension between the cases permitting this *modus operandi* type testimony cited by the Solicitor General and the cases such as *Brito*, 136 F.3d 397, and the cases which suggest such evidence constitutes inadmissible "drug-courier profile" testimony, that issue is not presented in either this petition or the *McGowan* petition currently pending before this Court.[6] There is no conflict between *Vallejo, McGowan* and *Pineda-Torres* and

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[6] The Solicitor General mistakenly believes that counsel for respondent McGowan conceded that there was some "tension" between *Vallejo* and the cases discussed in the *McGowan* petition. *See* Reply Brief For The United States in *United States v. McGowan*, No. 02-64. Not so. Respondents McGowan and Pineda-Torres steadfastly maintain that there is no conflict between the decision in *Vallejo* and any other circuit court case. To the extent that conflict exists between those cases which find impermissible "drug courier profile" type testimony and those which do not, that is not the issue presented in *Vallejo*, *McGowan* or *Pineda-Torres*.

any other case which addresses the issue resolved there – whether or not an expert may opine about the structure of drug smuggling organizations consistent with Federal Rule of Evidence 403 in a case where there is no evidence of the workings of a drug smuggling organization.

In its Response to the pending *certiorari* petition filed in *McGowan*, No. 02-64, respondent sets forth a comprehensive discussion of the cases which permit this *modus operandi* testimony and how that testimony is actually linked on an evidentiary basis to the facts of those cases – something which was absent in *Vallejo*, *McGowan* and *Pineda-Torres* and respondent relies upon that discussion. *See McGowan Opposition* at pp. 30-32.

B. The *Pineda-Torres* Case Neither Creates Nor Applies Any Blanket Prohibition Upon Expert Testimony About The Structure Of Drug Smuggling Organizations.

The Solicitor General contends that the *Pineda-Torres* decision presents an example of a categorical prohibition applied to a certain type of expert testimony which exists in the Ninth Circuit. The discussion of the *Pineda-Torres* decision set forth above, *supra* at pp. 7-9, as well as below, should dispel that notion. *Pineda-Torres* depended entirely upon its facts, which the decision discusses at great length, and it never once referred to the Ninth Circuit's earlier decision in *Vallejo* as establishing a "rule"[7] or as the Solicitor General believes, some sort of categorical prohibition. *See Pet.* at (I). In support for its argument that respondent's case should travel with the *McGowan certiorari* petition, the Solicitor General also contends that *Pineda-Torres* relies upon the *McGowan* case. *See Pet.* at 4-5. *Pineda-Torres* does not depend upon the *McGowan* decision.[8] It does rely

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[7] *McGowan* referred to the *Vallejo* decision as establishing a "general rule." 274 F.3d at 1254. The *Pineda-Torres* decision nowhere uses that terminology.

[8] *Pineda-Torres* cited *McGowan* with the "*see also*" signal in front of it, indicating that it was merely supplemental authority. Similarly, it noted, as an aside, in a footnote that the testifying expert in the *McGowan* case was the same individual who provided the expert

upon earlier precedent in *Vallejo*, 237 F.3d 1008, *amended*, 246 F.3d 1150, however, that decision does not create any sort of categorical prohibition to the admission of a certain type of expert testimony. *See generally id.*[9]

First, the *Pineda-Torres* court never refers to any sort of "rule" regarding the admission of expert testimony about the structure of drug trafficking organizations. *See generally Pineda-Torres*, 287 F.3d 860. Neither does it refer to the *Vallejo* case as establishing a categorical rule – *Vallejo* simply provides a framework for application of Federal Rules of Evidence 401 and 403. *Id.* at 862-863. While it discussed the factual similarities of Mr. Pineda-Torres' case with the facts of *Vallejo*, the most important similar fact was the government's failure to provide proper foundation for admission of this expert testimony. There was no evidentiary link between a drug smuggling organization and the facts of both Mr. Vallejo and Mr. Pineda-Torres' cases. *See Pineda-Torres*, 287 F.3d at 863 ("Neither Vallejo, nor Pineda-Torres, was charged with conspiracy and in neither case did the government introduce any evidence establishing a connection between the defendant and a drug trafficking organization.") (citing *Vallejo*, 237 F.3d at 1015) (other citations omitted).[10] In

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testimony at issue there. *Pineda-Torres* 287 F.3d at 863 n.3.

[9] The Solicitor General in its petition in *McGowan*, No. 02-64, incorrectly asserts that "the Ninth Circuit's rule categorically excludes a traditional form of relevant and admissible evidence, and thus needlessly complicates the prosecution of a common type of drug offense in the Nation's border districts." *McGowan Pet.* at 8. This is not the case. No such categorical rule has been created; the only evidence which is excluded is that without demonstrated relevance under the facts of each case. If anything, the omission of this testimony absent any proper foundation will lead to far less complication in an otherwise simple case. This result is what this Court's precedents and the Federal Rules of Evidence, 401-403 as well as 702 require.

[10] In *Pineda-Torres*, *McGowan* and *Vallejo*, the prosecution simply introduced this type of narcotics smuggling expert testimony without providing evidence that any drug smuggling organization was involved in the case. The Solicitor General may suggest that such evidence would be difficult to obtain; however, as government counsel conceded in *Vallejo*, the prosecution in the Southern District of California was "routinely introduc[ing] the structure of

Pineda-Torres, the court of appeals, while recognizing that *Vallejo* is substantially similar, conducted an analysis of the expert testimony under Federal Rules of Evidence 401 and 403 and found itself in accord with the *Vallejo* analysis. *See id.* at 862-863. In fact, the *Pineda-Torres* court determined that, apart from the *Vallejo* decision, application of the evidentiary rules to the facts of Mr. Pineda-Torres' case, revealed that here, the expert testimony was "even more prejudicial than the testimony in *Vallejo*." *Id.* at 866.

Indeed, if *Pineda-Torres* was simply an invocation of a pre-existing rule set forth in the *Vallejo* case, the court of appeals would have had no need to provide any analysis whatsoever – a citation to *Vallejo* would have sufficed.[11] Instead, the appeals court set forth a lengthy discussion of the facts of Mr. Pineda-Torres' case, the pre-trial proceedings, including the expert notice, the *in limine* hearing, the expert testimony introduced at the trial, and the disputed trial issues. *See Pineda-Torres*, 287 F.3d at 861-862. The decision then applied each of the facts discussed to the appropriate framework for analyzing whether admission of evidence was error under the Federal Rules of Evidence 401 and 403.

Contrary to the Solicitor General's contention, neither *Vallejo*, *McGowan* nor the instant case hold that expert testimony about the structure of drug trafficking organizations, is *per se* irrelevant and overly prejudicial in all prosecutions involving narcotics couriers. *See Pet.* at 4-5. Instead, the Court of Appeals has ruled that admission of this "structure" testimony was error for a simple reason:

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drug trafficking organizations in every drug importation prosecution to make up for the lack of fingerprints on the drugs in question." *Vallejo*, 237 F.3d at 1015. Thus, it is the government who encouraged application of the *per se* rule of admission of this expert testimony in every drug importation case regardless of the underlying facts or any asserted defenses.

[11] There would have been no need to issue a published decision in the *Pineda-Torres* case if the *Vallejo* decision already set forth this categorical rule.

the government has failed in each of these cases to "introduce any evidence establishing a connection between [the defendant] and a drug trafficking organization." *Vallejo*, 237 F.3d at 1015; *McGowan*, 274 F.3d at 1254; *Pineda-Torres*, 287 F.3d at 864. Because of the lack of foundation, the evidence is irrelevant and, if probative at all, unduly prejudicial because it unfairly "portray[s the defendant] as a member of an enormous international trafficking organization and implie[s] that he knew of the drugs in his car because of his role in that organization." *See Vallejo*, 237 F.3d at 1017. But nothing in *Vallejo*, *McGowan* or respondent's case suggests that, if a proper foundation is offered establishing a connection between the defendant and an organization, such expert testimony would not be admissible. In *Pineda-Torres*, as in *Vallejo* and *McGowan*, the Court of Appeals' decisions reach the common sense conclusion that where the government fails to offer *any* evidence linking the defendant to a Mexican drug smuggling organization, the admission of highly prejudicial testimony regarding such organizations is not justified under Fed. R. Evid. 401 and 403. This is not a revolutionary concept, limited to the Ninth Circuit. *See, e.g., United States v. Castillo*, 924 F.2d 1227, 1234 (2d Cir. 1991) ("we take serious issue with the Government's use of an expert witness to propound the impermissible theory that appellants' guilt could be inferred from the behavior of unrelated persons"); *accord United States v. Cruz*, 981 F.2d 659, 663 (2d Cir. 1992) (same); *Long*, 917 F.2d at 701-03 (admission of expert testimony on organized crime figures who were not connected to the defendants "had the effect of implicating [the defendants] as part of a much larger criminal organization and associating them with all the sinister aspects and activities of that criminal organization").

Moreoever, the Solicitor General's claim that the Court of Appeals has established a *per se* bar to expert testimony of the sort offered in respondent's case is belied by the numerous post-*Vallejo* cases in which the Ninth Circuit has approved expert *modus operandi* testimony in drug cases, many

of which were cited in the *Pineda-Torres* decision itself, *see Valencia-Amezcua*, 278 F.3d at 909 ("*Vallejo* expressly approved admissibility of *modus operandi* testimony"); *Murillo*, 255 F.3d 1169 (permitting "'unknowing drug courier'" and modus operandi testimony); *Alatorre*, 222 F.3d at 1100 n.3 (allowing drug trafficking organization and structure testimony where defendant opens the door by arguing lack of fingerprints) as well as the cases factually similar to *Pineda-Torres*, *McGowan* and *Vallejo*, where the Ninth Circuit approved "structure" testimony when the evidence elicited at the trial provided sufficient foundation. *See, e.g., United States v. Lopez*, No. 01-50683 (9th Cir. August 14, 2002) (expert testimony about drug trafficking organizations admissible where defendants introduced evidence about lack of fingerprint evidence); *United States v. Moreno-Fuentes*, No. 01-50207 (9th Cir. April 24, 2002) (same); *United States v. Hernandez-Silva*, No. 0010641 (9th Cir. March 12, 2002) (expert testimony about illicit drug trafficking business admissible in drug courier case where conspiracy was charged). As is indicated in both *Pineda-Torres*, 287 F.3d at 863, prior decisions admitting this expert *modus operandi* testimony were untouched by *Vallejo*. *See Campos*, 217 F.3d at 712 (upholding unknowing courier testimony in a "complex drug importation case");*Cordoba*, 104 F.3d at 230 (same); *see also Vallejo*, 237 F.3d at 1015-1016 (listing cases, with approval, where courts "allowed 'government agents or similar person [to] testify as to the general practices of criminal to establish the defendants' modus operandi'").

In its response to the Solicitor General's petition for *certiorari* in *McGowan*, No. 02-64, counsel for respondent McGowan sets forth other persuasive reasons why neither *McGowan* nor *Vallejo* imposes any *per se* rule requiring exclusion of the government's proposed expert testimony and discusses why the *McGowan* case does not satisfy this Court's criteria for a grant of *certiorari*. *See McGowan Opposition* at pp.11-34. The respondent incorporates by reference those arguments and adopts them as his own.

B. The *Pineda-Torres* Case Is Distinct From *McGowan*, It Did Not Depend Upon *McGowan*, And It Should Not Be Held Pending Disposition in *McGowan*

Even if this Court were to consider *McGowan* as the proper vehicle for a grant of *certiorari*, it should leave undisturbed the *Pineda-Torres* decision. As noted above, *Pineda-Torres* does not set forth any bright-line rule, it engages in its own evidentiary analysis, and it is heavily factually dependent, thus it fails to set forth any broad principles of application. As discussed above at pp. 7-9, the *Pineda-Torres* court ruled that expert testimony regarding the structure of drug trafficking organizations was inadmissible under the following circumstances: (1) where the prosecution failed to articulate, either before or during trial, any basis for the relevance and admission of this government expert's testimony, *Pineda-Torres*, 287 F.3d at 863; (2) where it failed to circumscribe the content of the testimony, *Pet. App.* at 13a-15a; (3) where the prosecution gave pretrial notice that it would raise the "lack of fingerprints" issue, *Pineda-Torres*, 287 F.3d at 862-863; (4) where no evidentiary foundation for the evidence had been laid, *id.*, and (5) where, on appeal, the government in *Pineda-Torres* urged that its expert witness be allowed to explain Mr. Pineda-Torres' role as a "knowing courier." *Resp. App.* at 6a. These facts should all be contrasted with the decision in *McGowan* where detailed reasons were offered pre-trial in support of the testimony, where the trial judge "meticulously limited" the testimony, and stated that the expert could not opine that the couriers were "knowing," where the government did not contend that it planned to raise the fingerprint issue pre-trial, and where no explicit concession is made that under certain circumstances, this evidence would be relevant.[12] *Pineda-Torres* is distinct factually from *McGowan* and its

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[12] In distinguishing the *Murillo* case, *McGowan* notes that *Murillo* did not involve a challenge pursuant to Fed. R. Evid. 403, but, rather, simply involved Fed. R. Evid. 401. *McGowan* by no means provides that this "structure" testimony could never survive a Rule 403 challenge – however, *Pineda-Torres* explicitly states that it can and cites cases to that effect. *See Pineda-Torres*, 287 F.3d at 864-865.

determination depends so heavily upon its facts, that it should not be held pending resolution of the pending *certiorari* petition in *McGowan*.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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